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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324,
JESSE THOMAS, JESSE DURRAN, JR.,
JESSE DURRAN, SR., and CHARLES EVANS,
Petitioners,

v.

DOUGLAS MURRAY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Respondent's brief in opposition to the Petition for Certiorari, written by an attorney who was not counsel of record at trial or appeal below, mischaracterizes the record, ignores the reasoning of the courts in the cases cited, and attempts to distract this Court from key issues raised in the petition.

The trial court's motive for removing Juror Giancoli was stated as a basis for reversal both in Petitioners' Motion for Judgment as a Matter of Law and a New Trial and their Ninth Circuit appellate brief. Moreover,

Petitioners cogently argued that the judge's knowledge that Giancoli was a holdout and his purpose in removing Giancoli to obtain a quick verdict were discernible from the circmumstances presented at trial, regardless of Giancoli's subsequent, consistent declaration.

Respondent claims that the collective bargaining agreement at issue in this case did not prohibit the Union from notifying Douglas Murray, in his absence from the hiring hall, that an employer had requested him by name. However, Respondent also acknowledges that an arbitrator had previously ruled that the union was actually prohibited by its agreement from so advising Murray. Respondent attempts to avoid the effect of that ruling by characterizing the arbitrator's reasoning as "dicta." However, Arbitrator McKay is the permanent, neutral, hiring hall arbitrator, vested with the authority to interpret the contractual provisions at issue in this case. His rulings cover any conduct relating to the hiring hall and his interpretation of the agreement is binding on the parties to this dispute. The law is well settled that an arbitrator's interpretation of a collective bargaining agreement becomes part of that agreement and is binding on the parties.

Finally, Respondent's attempt to distinguish the Court's reasoning in *International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) ignores the Court's reasoning in that case. There, this Court was concerned with avoiding penalizing other dues paying members for union misconduct by weakening their representative with crippling damage awards. Thus, Respondent's analogy to 42 U.S.C. § 1983 cases is inapposite. Respondent also fails utterly to address Petitioner's discussion of the substantive shortfall of the Ninth Circuit's meager review of the punitive damage award in this case. The parameters of such review are a matter of federal Constitutional law. As such, the decisions of this Court, not those of the Ninth Circuit, are controlling.

For those reasons, Respondent's reply brief does not rebut Petitioners' demonstration that important issues, meriting review by this Court, have been presented.

ARGUMENT

I. PETITIONERS RAISED THE ISSUE OF THE TRIAL JUDGE'S IMPROPER MOTIVE FOR REMOVING THE HOLDOUT JUROR IN THEIR MOTION FOR JUDGMENT AS A MATTER OF LAW AND NEW TRIAL AND NINTH CIRCUIT APPELLATE BRIEF BELOW

Respondent claims that Petitioners failed to argue below that the trial judge was improperly motivated to dismiss Juror Giancoli in order to alleviate a seven to one deadlock. The current counsel for Respondent only very recently took over work on this case. He was neither counsel of record at trial nor before the Ninth Circuit. Accordingly, he may not have the entire record in his possession. In any event, his assertion is mistaken.

In her memorandum in support of her Motion for Judgment as a Matter of Law and a New Trial, counsel for Petitioners argued that

> the Court was well aware that the jury was deadlocked having received at least three notes to that effect, and having received a note signed solely by Mr. Giancoli on the date that he was released stating that the jury was "hopelessly divided."

(App. A, p. 3a, *infra*) Counsel for Petitioners also argued that "the court was apparently so anxious to obtain a verdict" that it rejected counsel's suggestion that Giancoli be allowed to continue deliberations for the remaining hour and fifteen minutes before he had to leave or that the court determine whether the jurors needed any clarification of instructions. (App. A, p. 1a, *infra*)

In her brief to the Ninth Circuit, counsel for Petitioners raised the same arguments (App. B, pp. 4a, 6a *infra*)

Thus, Respondent's claim that the judge's improper motive for dismissing Giancoli was not raised below is belied by the record. Nor is Respondent's effort to characterize the arguments below as resting solely on Juror Giancoli's declaration accurate. The citations above and the excerpts of record already submitted to this Court make clear that Petitioners based their discussion of the judge's intent on his conduct and the objective circumstances within which he acted. Petitioners will not repeat their discussion of the jurors' notes or the judge's statements here, but the Court is encouraged to review pages 4 and 5 of the Petition and the cited references to the appendix.

Respondent's contention that Juror Giancoli's removal was proper because, at the time of his dismissal, it was only speculation that Giancoli was a holdout juror demonstrates Respondent's failure to understand the Constitutional importance of untampered jury deliberations and the right to a unanimous verdict. Because of the standard jury instructions which inform jurors not to comment upon the substance of their deliberations, unless a juror stands up and announces that he or she is a "lone holdout," the juror's status at the time of his or her dismissal from the jury is *always* speculative. It is precisely because of the speculative nature of the juror's status at the time of dismissal that the courts do not hesitate to order a new trial where there is a "possibility" or even a "hint" that the dismissed juror may have been a lone hold-out juror. (See cases cited at pages 11-12 of the Petition). While Giancoli's status may have been speculative, there was certainly a good possibility and, indeed, a probability that he was a lone hold-out juror at the time he was dismissed, and this possibility was adamantly pointed out by Petitioners' counsel at the time the court was contemplating the dismissal. The court, however, simply gave short shrift to those concerns expressed by Petitioners' counsel and dismissed Giancoli even before his actual time conflict arose, thereby denying Petitioners their Constitutional right to a unanimous jury verdict.

II. THE NINTH CIRCUIT'S AFFIRMANCE OF LMRDA LIABILITY FOR CONDUCT REQUIRED OF PETITIONERS BY THE NLRA CONTRAVENED CONGRESSIONAL INTENT IN ENACTING THE NLRA AND CREATED AN IRRECONCILABLE FEDERAL STATUTORY CONFLICT

Respondent attempts to distract this Court's attention from the Ninth Circuit's contravention of Supreme Court precedent and Congressional intent regarding the National Labor Relations Act and the Labor-Management Reporting and Disclosure Act in three ways. First, counsel erroneously emulates the Ninth Circuit by claiming that Petitioners' liability under the LMRDA was based on conduct other than the failure to notify Respondent that an employer had requested him by name through the hiring hall. However, the record is clear that the only basis upon which the jury could have imposed its $10,000 punitive damage award on Petitioner Durran, Jr., was the hiring hall referral issue. See Petition, pp. 25-26. A mere gesture by the Ninth Circuit to the record as a whole did not change that fact.

Secondly, counsel ignores the significance of Arbitrator McKay's binding interpretation of the collective bargaining agreement at issue in this case. The parties' agreement, as interpreted, *prohibited* Petitioners from notifying Murray of the employer's request. To have violated the agreement would have constituted an unfair labor practice under the National Labor Relations Act. This Court has been clear on that point. See *Breininger v. Sheet Metal Workers Int'l Assn., Local Union No. 6*, 493 U.S. 67, 76 (1989).

This Court has also held that a concedely improper failure to refer is not "discipline" within the meaning of the LMRDA §§ 101(a)(5) and 609, but has not yet ruled whether the same is true of § 102. Here, it was determined by all (the arbitrator, the National Labor Relations Board, the District Court, and the Ninth Circuit)

that the failure to notify was *not improper*, but was required, under the hiring hall rules contained in the collective bargaining agreement, yet Petitioners were held liable for an LMRDA violation.

Thus, this case presents important questions regarding the interpretation of the LMRDA and creates a conflict between the requirements of the NLRA and the LMRDA, leaving unions in the untenable position of either violating the duty of fair representation or violating the LMRDA. Resolution of that conflict merits the attention of this Court.

Finally, Respondent tries to characterize Petitioners' arguments on this issue as resting solely on a Ninth Circuit case (*NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (9th Cir. 1978)) and only involving an intracircuit conflict. As discussed above and in the Petition, a conflict with Supreme Court precedent (*Breiringer*, *supra*) and a statutory contradiction are at issue. Thus, this case involves *not only*, but *also*, a conflict within the Ninth Circuit.

III. RESPONDENT'S ARGUMENTS IN OPPOSITION TO GRANTING CERTIORARI IGNORE THE PRINCIPLES ENUNCIATED IN *INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. FOUST* AND FAIL TO ADDRESS THE SUBSTANTIVE INADEQUACY OF THE NINTH CIRCUIT'S REVIEW OF THE PUNITIVE DAMAGES AWARD IN THIS CASE

Finally, Respondent attempts to distinguish this Court's prior discussion of punitive damage awards against unions in *IBEW v. Foust*, *supra*, by dwelling on the fact that *Foust* involved a DFR violation while this case involves an alleged violation of the LMRDA. That issue was discussed at length in the petition at pages 23-24.

Respondent fails to address the Court's *reason* for invalidating the award in *Foust*: to avoid depleting "union

treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents." 442 U.S. at 50. Respondent has provided no explanation for why the same reasoning does not apply in this context. The existence of Court of Appeals decisions supporting punitive damages for LMRDA violations does not negate the jurisprudential significance of this Court's reasoning in *Foust*. A conflict between a Court of Appeals decision and a Supreme Court decision, such as is presented here, is one of the strongest reasons of all for granting certiorari. See, e.g., *United States v. Doe*, 465 U.S. 605, 610 (1984).

None of the cases cited by Respondent for the proposition that punitive damages may be imposed for LMRDA violations are on point. Here, the conduct that the LMRDA violation allegedly was based on was *required* by the NLRA and the parties' agreement. It is inconceivable that Congress intended to subject unions to crippling liability under the LMRDA for conduct mandated by the NLRA.

It is telling that Respondent makes no meaningful effort to contest the arguments presented at Petition pages 17 to 23 regarding the substantive inadequacy of the Ninth Circuit's review of the punitive damages award in this case. Respondent apparently claims that it was Petitioner's responsibility to ensure that the Ninth Circuit's review was substantively sufficient. In addition to attributing power to Petitioners beyond that allocated to parties under our legal system, Respondent's argument ignores the fact that review of punitive damage awards for conformity with due process requirements is governed by federal Constitutional law, not the parties' pleadings or Ninth Circuit case law. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. ——, 129 L.Ed.2d 336 (1994); *TXO Production v. Alliance Resources*, —— U.S. ——, 125 L.Ed.2d 366 (1993); *Paramount Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari and the Supplemental Brief, as well as on the record as a whole, Petitioners suggest that certiorari should be granted in this case to resolve these important federal constitutional and statutory issues.

Respectfully submitted,

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